No. 13-17-00659-CV

In the Court of Appeals for the Thirteenth Judicial District Corpus Christi, Texas

TEXAS DEPARTMENT OF PUBLIC SAFETY,

Appellant,

v.

LEROY TORRES,

Appellee.

On Appeal from the
County Court at Law Number One, Nueces County
No. 2017-CCV-61016-1

BRIEF FOR APPELLANT

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ORAL ARGUMENT REQUESTED

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Statement of the Case

Nature of the Case:	This is a suit for damages under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4323(b)(2).
Course of Proceedings:	Plaintiff-Appellee, Leroy Torres, a military veteran, sued Defendant-Appellant, the Texas Department of Public Safety (DPS), for damages under the USERRA, alleging that DPS refused to sufficiently accommodate his reemployment after he was honorably discharged from the military. CR.24-25. DPS responded by filing a plea to the jurisdiction based on sovereign immunity. CR.36.
Trial Court:	The Honorable Robert J. Vargas, County Court at Law Number One, Nueces County, Texas.
Trial Court Disposition:	The trial court denied DPS's plea to the jurisdiction. RR.28; CR.134.

Statement Regarding Oral Argument

Appellant, Texas Department of Public Safety, respectfully requests oral argument in this case. Oral argument would assist the court's decisional process with regard to the multifaceted issues involved in the important question of whether Congress has authority under the United States Constitution to abrogate a state's sovereign immunity from private suits for damages.

Issues Presented

The USERRA, a federal statute, prohibits adverse employment actions against an employee based on the employee's military service. 38 U.S.C. § 4311 *et seq.* In addition to providing for enforcement suits by individuals against private employers, and by the United States against both private and state employers, USERRA further

states that, "[i]n the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State." *Id.* § 4323(b)(2). The issue presented is whether, absent an express waiver of immunity, USERRA claims by private individuals against the State of Texas are barred by sovereign immunity.

Introduction

Texas cannot be sued in its courts by its citizens without express permission of a kind not present here. Thus, while Torres argues that he is entitled to collect over five million dollars from the treasury of the State of Texas, this action is barred by sovereign immunity. To allow the claim to proceed would take away the people's right to have their public monies allocated by their elected representatives, and instead subject the state budget to the unpredictable and volatile pressures of individual private litigants. Plaintiff claims that he can overcome this established doctrine because Congress said so in USERRA. Binding precedent, however, from both the Supreme Court of the United States and the Texas Supreme Court, clearly shows that Congress had no power to abrogate state sovereign immunity through USERRA. Furthermore, it is not clear that USERRA even purports to limit state sovereign immunity. Accordingly, this Court should vacate the trial court's order denying DPS's jurisdictional plea, and dismiss the case for lack of subject-matter jurisdiction.

Statement of Facts

Torres was enlisted in the United States Army Reserve, and was deployed to Iraq in 2007.[1] CR.24. Before being deployed to Iraq, he was employed by DPS as a trooper. *Id.* Plaintiff was honorably discharged from the Army in 2008 and subsequently notified DPS of his intent to be reemployed. CR.24-25. While in Iraq, however, he developed a lung disease as a result of exposure to toxic fumes. *Id.* at 25. Torres requested that, due to his health, he be reemployed in a different job that did

[1] Because this case is currently on appeal from a plea to the jurisdiction, all facts are taken from the Plaintiff's allegations in his complaint, and construed in the light most favorable to him.

not require resuming the full duties of a DPS trooper. CR.25; *cf.* RR.7. DPS declined to offer him a different job, but did provide a temporary duty offer of continued employment in his prior capacity. CR.25. Torres alleges that various DPS employees pressured him to resign. *Id.* Torres and DPS were unable to come to a mutually acceptable solution and, rather than return to his original position, he resigned. RR.26.

Torres sued in state court, alleging that DPS's refusal to give him a different job violated the USERRA. RR.6-7; CR.5. DPS filed a plea to the jurisdiction based on sovereign immunity, seeking dismissal of Torres's lawsuit. CR.36. The State argued that private USERRA claims against state agencies are barred by sovereign immunity because the Texas Legislature has not waived its immunity and Congress lacks authority to abrogate the states' sovereign immunity with respect to USERRA claims. CR.41-44. The trial court denied DPS's plea to the jurisdiction. RR.28; CR.134. This appeal ensued. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(8).

Summary of the Argument

Sovereign immunity is only abrogated under two circumstances—neither of which is present here. First, a State can waive its sovereign immunity if it does so in clear and unambiguous language. *Alden v. Maine*, 527 U.S. 706, 737 (1999); *Tooke v. City of Mexia*, 197 S.W.3d 325, 328–29 (Tex. 2006). Because the State of Texas has not waived its sovereign immunity to private USERRA suits, it may only be sued by the United States on behalf of a USERRA claimant and not by the claimant himself. *Alden*, 527 U.S. at 759–60.

Second, Congress may abrogate state sovereign immunity if it (i) has specific constitutional authority to do so, and (ii) is unmistakably clear about its intent to abrogate sovereign immunity. *Univ. of Tex. at El Paso v. Herrera*, 322 S.W.3d 192, 195 (Tex. 2010). The Supreme Court and the Texas Supreme Court have both repeatedly held that Congress may only abrogate a state's sovereign immunity from private suits for damages when using its powers under section 5 of the Fourteenth Amendment, and never under its Article I powers. USERRA, however, is an exercise of Congress's Article I powers. Thus, Congress has no power to abrogate state sovereign immunity through USERRA.

Even if Congress had the authority to abrogate state sovereign authority through USERRA, it has not unmistakably purported to do so. The jurisdictional provision of 38 U.S.C. § 4323(b)(2) explicitly says that it is subject to "the laws of the State." At most this is an unclear statement as to whether state sovereign immunity is one of the laws of the state to which 38 U.S.C. § 4323(b)(2) is subject. The State therefore retains its sovereign immunity to private damage suits under USERRA, and Torres's claim should be dismissed for lack of subject matter jurisdiction.

Standard of Review

A plea to the jurisdiction based on sovereign immunity is a challenge to the trial court's subject matter jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004). Whether a court has subject matter jurisdiction, and whether a pleader has alleged facts that affirmatively demonstrate a trial court's subject matter jurisdiction, are both questions of law reviewed *de novo*. *Id.* at 226; *see also Hoff v. Nueces Cty.*, 153 S.W.3d 45, 48 (Tex. 2004) (per curiam) ("We review a

plea to the jurisdiction based on sovereign immunity de novo."). A waiver of sovereign immunity by statute or a valid abrogation of sovereign immunity by Congress both involve issues of statutory construction, also reviewed *de novo*. *Marks v. St. Luke's Episcopal Hosp*., 319 S.W.3d 658, 663 (Tex. 2010).

ARGUMENT

"The inherent nature of sovereignty prevents actions against a state by its own citizens without its consent." *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 51 (1944). A state thus enjoys sovereign immunity from damage suits brought by private individuals by virtue of its sovereignty that preexisted the Constitution, and which was confirmed by the Eleventh Amendment. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) ("[T]he Eleventh Amendment . . . confirms . . . first, that each State is a sovereign entity in our federal system; and second, that it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." (citations and internal quotation marks omitted)); *see also Alden*, 527 U.S. at 728–29 ("The Eleventh Amendment confirmed, rather than established, sovereign immunity as a constitutional principle."); The Federalist No. 81, at 487-88 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that immunity from private suit "is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States . . . ."). As part of entering the Union, the states waived their immunity from suit by the United States, but retained immunity from private damage suits. *Alden*, 527 U.S. at 759–60. Sovereign immunity protects the state not merely from liability

but also from suit. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 766 (2002).

The State enjoys this immunity in both state and federal court. *Alden*, 527 U.S. at 745 ("We have said on many occasions, furthermore, that the States retain their immunity from private suits prosecuted in their own courts."); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994) ("The Eleventh Amendment largely shields States from suit in federal court without their consent, leaving parties with claims against a State to present them, if the State permits, in the State's own tribunals."). Thus, as Torres conceded below, CR.55-56, this USERRA claim is also barred in federal court. *McIntosh v. Partridge*, 540 F.3d 315, 321 (5th Cir. 2008) (holding that USERRA does not provide for federal jurisdiction over a suit by an individual against a state as employer).

Consistent with the Supreme Court's directives, the Supreme Court of Texas has zealously guarded the State's immunity from private damage suits in its own courts, holding that the State retains sovereign immunity unless it expressly consents to suit. *Hall v. McRaven*, 508 S.W.3d 232, 234, 238 (Tex. 2017) ("[B]efore a court can reach [the merits], a plaintiff must overcome the state's sovereign immunity. . . . Sovereign immunity requires the state's consent before it can be sued."); *Prairie View A & M Univ. v. Chatha*, 381 S.W.3d 500, 512 (Tex. 2012) ("Sovereign immunity bars suits against the state and its entities."); *Herrera*, 322 S.W.3d at 195 ("Our federal and state constitutional designs embody the principle of state sovereignty that shields States from private suits in their own courts and in the federal courts.").

Therefore, a private suit for damages is "barred by sovereign immunity unless (1) Congress validly abrogates it, or (2) the State voluntarily waives it." *Id*. Because neither of those conditions is met here, the State's sovereign immunity is retained, and the case must be dismissed.

I. Texas Retains Sovereign Immunity From Private Suit Because It Has Not Waived Sovereign Immunity from Damages Suits Under USERRA.

The only way in which the State can waive its sovereign immunity is "through the Constitution and state laws. . . . [I]t is the Legislature's sole province to waive or abrogate sovereign immunity." *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 660 (Tex. 2008) (internal quotation marks omitted); *see also Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 808 (Tex. 2016) ("[S]overeign immunity is universally recognized and fundamental to the nature and functioning of government. . . . [W]e leave it to the Legislature to make changes to that doctrine."); *id.* at 808 n.62; *cf. Alden*, 527 U.S. at 749 ("[T]he immunity of a sovereign in its own courts has always been understood to be within the sole control of the sovereign itself.").

When determining whether a state has waived its sovereign immunity in a particular case, the Supreme Court looks to the state's law. *See*, *e.g.*, *Alden*, 527 U.S. at 757-58 (looking to the Supreme Court of Maine to establish the standard for determining whether Maine had waived its sovereign immunity). That standard is straightforward in this case: the State of Texas retains sovereign immunity unless is it waived in a statute by "clear and unambiguous language." Tex Gov't Code § 311.034; *e.g.*, *Chatha*, 381 S.W.3d at 512; *Tooke*, 197 S.W.3d at 328–29; *City of*

LaPorte v. Barfield, 898 S.W.2d 288, 291 (Tex. 1995); *Duhart v. State*, 610 S.W.2d 740, 742 (Tex. 1980); *accord. Sossamon v. Texas*, 563 U.S. 277, 290 (2011) ("[A] waiver of sovereign immunity must be expressly and unequivocally stated in the text of the relevant statute."). It is insufficient for a statute to merely state that a governmental entity may "sue and be sued" or "plead and be impleaded"—such directions are not clear and unambiguous waivers of sovereign immunity under Tex. Gov't Code § 311.034. *Tooke*, 197 S.W.3d at 342. There is no clear and unambiguous waiver for USERRA claims, and Torres did not point to any purported waver during the proceedings below.[2]

Such a bright-line rule can seem harsh at times, leaving an individual without a remedy that they otherwise could have sought against a private defendant. *Hall*, 508 S.W.3d at 243 ("As important as a mistake may be, sovereign immunity comes with a price; it often allows the 'improvident actions' of the government to go unredressed."). Such determinations, however, lie with the legislature—and there is good reason for this rule. *See Tooke*, 197 S.W.3d at 332 (explaining that one "important purpose" of sovereign immunity is "to shield the public from the costs and consequences of improvident actions of their governments"). Sovereign immunity serves to protect the ability of the state to best allocate its resources in accordance with the will of its citizens. *Alden*, 527 U.S. at 750–51 ("[P]rivate suits for money

[2] Plaintiff's assertions to the court below turn the applicable precedent on its head by misrepresenting that a state only has sovereign immunity if it expressly retains sovereign immunity. RR.20-24.

damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens. . . . [T]he allocation of scarce resources among competing needs and interests lies at the heart of the political process. . . . If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen."); *cf.* Tex Gov't Code § 311.034 (Stating sovereign immunity cannot be waived absent clear and unambiguous language "in order to preserve the legislature's interest in managing state fiscal matters through the appropriations process"); *Chatha*, 381 S.W.3d at 513 ("[I]n order to allow the Legislature to protect not only its policy-making function but also to preserve its interest in managing state fiscal matters, this Court consistently defers to the Legislature to waive immunity from suit.").

Contrary to Plaintiff's claims, however, an individual is not left entirely without remedy for a potential USERRA violation if his state employer has not waived sovereign immunity. Rather than suing the State for damages in violation of its sovereign immunity, an aggrieved individual, following a prescribed administrative process, may request the United States Attorney General to file suit on the individual's behalf. *See* 38 U.S.C. § 4323(a)(1). If the Attorney General takes the case, suit is filed "in the name of the United States" in federal court. *Id.* § 4323(a)(1), (b)(1). Because it would be brought by the United States, such a suit would not be barred by sovereign immunity. This is a substantive distinction for purposes of sovereign immunity, and is sufficient to protect the federal government's interests in protecting members

of the armed services from discrimination. *See Alden*, 527 U.S. at 759–60 ("The difference between a suit by the United States on behalf of the employees and a suit by the employees implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the State; and history, precedent, and the structure of the Constitution make clear that, under the plan of the Convention, the States have consented to suits of the first kind but not of the second.").

II. Texas Retains Sovereign Immunity From Private Suit Because Congress Has Not Abrogated State Sovereign Immunity Under USERRA.

Because Texas did not clearly and unambiguously waive its sovereign immunity by statute—and Torres has not shown otherwise—only a valid abrogation by Congress of the State's sovereign immunity for a USERRA claim would permit Torres's lawsuit against DPS for damages. To show a valid congressional abrogation of a state's sovereign immunity, Torres had to show that "Congress (1) unequivocally expresse[d] its intent to do so, and (2) act[ed] pursuant to a constitutional provision granting Congress the power to abrogate." *Herrera*, 322 S.W.3d at 195 (internal quotation marks omitted). Torres showed neither requirement.

A. Congress Did Not Unmistakably Evince an Intent to Abrogate State Sovereign Immunity in the Text of USERRA.

It is black-letter law that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Seminole Tribe*, 517 U.S. at 56 (quoting *Dellmuth v. Muth*, 491 U.S. 223, 227–28 (1989)); *McIntosh*, 540 F.3d at 320–21 ("The Supreme Court has held that 'Congress may abrogate the States' constitutionally

secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute'" (*quoting Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985))); *cf. Sossamon*, 563 U.S. at 286 (holding, where a federal statute provided that it could be enforced by private suits for "appropriate relief," that "'[a]ppropriate relief' is open-ended and ambiguous about what types of relief it includes" and thus "'appropriate' relief, by itself, does not unambiguously include damages against a sovereign"). These holdings are reinforced by *Alden v. Maine*, which extended *Seminole Tribe* to also limit Congress's authority to abrogate state sovereign immunity in state court. *Alden*, 527 U.S. at 749 ("[A] congressional power to authorize private suits against nonconsenting States in their own courts would be even more offensive to state sovereignty than a power to authorize the suits in a federal forum.").

Yet instead of being "unmistakably clear" that Congress was abrogating sovereign immunity in USERRA, there are at least two indications "in the language of the statute" that Congress did ***not*** intend to allow USERRA claims by private individuals. *McIntosh*, 540 F.3d at 320–21. First, the plain text of 38 U.S.C. § 4323(b)(2) states that private individuals may sue a state under USERRA only "in accordance with the laws of the state." One of the laws of the State of Texas is that sovereign immunity protects the State and its agencies from suit, unless a legislative enactment waives immunity from suit by "clear and unambiguous language." Tex Gov't Code § 311.034. And, as already discussed, there is no Texas legislative enactment that waives sovereign immunity for USERRA claims, much less one that does so clearly

and unambiguously. Therefore, the plain text of USERRA unambiguously demonstrates that a private suit for damages cannot be brought in Texas, because such a lawsuit is not "in accordance with the laws of the state." Because Congress did not make an intention to abrogate state sovereign immunity "unmistakably clear in the language of the statute" *Seminole Tribe*, 517 U.S. at 56, we must presume that Congress was content to authorize private USERRA claims against states only if the states themselves chose to waive their own sovereign immunity for such claims.

This interpretation of the scope of private USERRA actions authorized by congress has been followed in other jurisdictions. The Supreme Courts of Alabama and Delaware, and the Courts of Appeals of Georgia and Tennessee, all hold that 38 U.S.C. § 4323(b)(2) does not abrogate a state's sovereign immunity for private USERRA claims against the state in unmistakably clear language but, instead, grants to the states themselves the decision of whether to waive sovereign immunity for such claims. *Larkins v. Dep't of Mental Health & Mental Retardation*, 806 So.2d 358, 363 (Ala. 2001) (noting that USERRA "arguably incorporates" *Alden*'s bar of private suits of unconsenting states, "[t]o the extent that Congress's deference to state law includes a state's laws dealing with its immunity from suit"); *Janowski v. Div. of State Police,* 981 A.2d 1166, 1170 (Del. 2009) ("Where, as here, the Attorney General declines to prosecute a case the individual plaintiff may proceed in accordance with the laws of the State. The laws of our State include our General Assembly's determinations about whether, when, and under what circumstances to waive sovereign immunity explicitly." (internal quotation marks omitted)); *Anstadt v. Bd. of Regents of Univ. Sys. of Ga.*, 693 S.E.2d 868, 871 (Ga. Ct. App. 2010) (holding that a suit

against the State of Georgia under USERRA would only be permissible if the State had explicitly waived its sovereign immunity, because only "a waiver would have allowed him to proceed in state court under 38 U.S.C. § 4323(b)(2) because [plaintiff's] suit under USERRA would have been brought in accordance with the laws of the State." (internal quotation marks omitted)); *Smith v. Tenn. Nat'l Guard*, 387 S.W.3d 570, 574 (Tenn. Ct. App. 2012) (holding that, because USERRA's jurisdictional statute limits private claims against States to those "in accordance with the laws of the State[,]. . . for an individual to sustain an action against a state pursuant to USERRA, the action must be permitted by state law" (internal quotation marks omitted)).

Second, when purporting to authorize private USERRA suits against states, Congress merely used the word "may" rather than "shall." 38 U.S.C. § 4323(b)(2) ("In the case of an action against a State (as an employer) by a person, the action *may* be brought in a State court of competent jurisdiction in accordance with the laws of the State." (emphasis added)). This provision stands in contrast to the statute's other provisions giving federal courts jurisdiction over USERRA claims brought by the United States, or brought by individuals against private employers, both of which provide that, in those situations "the district courts of the United States *shall* have jurisdiction." *Id.* § 4323(b)(1), (b)(3) (emphasis added).

The Ninth Circuit has recognized this distinction, finding that "Congress did not use the terms 'must' or 'shall' with respect to state court jurisdiction over USERRA claims" presumably to comply with *Alden*'s holding that "'the powers

delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts.'" *Townsend v. Univ. of Alaska*, 543 F.3d 478, 483 n.2 (9th Cir. 2008) (*quoting Alden*, 527 U.S. at 712). While there are indications in the legislative history of USERRA that some members of Congress may have wanted to abrogate state sovereign immunity, *see*, *e.g.*, H.R. Rep. No. 105–448, at 4–5 (1998), precedent dictates that the "unmistakably clear" abrogation of state sovereign immunity must appear, "in the language of the statute." *Seminole Tribe*, 517 U.S. at 56. The language which Congress actually included in the statute confirms that Congress knew it could not abrogate the states' sovereign immunity for private USERRA claims, so it used language which allows—but does not compel—state cooperation with private USERRA suits. *See Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 396 (1951) (Jackson, J., concurring) ("It is the business of Congress to sum up its own debates in its legislation . . . . For us to undertake to reconstruct an enactment from legislative history is merely to involve the Court in political controversies which are quite proper in the enactment of a bill but should have no place in its interpretation.").[3]

[3] Additionally, the cannon of constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text," *Clark v. Martinez*, 543 U.S. 371, 381 (2005), and would allow this Court to construe 38 U.S.C. § 4323(b)(2) as only applying to states which have waived their sovereign immunity rather than addressing whether the statute is unconstitutional as applied to a state, like Texas, which has not waived its sovereign immunity. *Alden*, 527 U.S. at 712.

B. There is No Constitutional Provision Granting Congress Authority to Abrogate State Sovereign Immunity Under USERRA.

Beyond Congress needing to express an unmistakably clear intent to abrogate a state's sovereign immunity, whether it has "the power to compel States to surrender their sovereign immunity for these purposes . . . is another matter." *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 635 (1999). Thus, even if Congress had expressly provided said that a State could always be sued in state court for a USERRA violation—which it did not—that declaration would be irrelevant if Congress lacked authority to override state sovereign immunity and authorize a suit for damages by a private individual against a State in state court. *Alden*, 527 U.S. at 712 ("[T]he powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts."). Here, it is undisputed that, in enacting the USERRA, Congress acted pursuant to its powers under Article I of the constitution. Congress, however, is not authorized under Article I to abrogate the states' sovereign immunity for USERRA claims brought by private litigants; it can only do so pursuant to its enforcement power under section 5 of the Fourteenth Amendment.

1. The Supreme Court has held that Article I does not authorize Congress to abrogate the states' sovereign immunity from private suits for damages.

There was a brief period in which a fractured Court departed from centuries of legal precedent to find that Congress could abrogate a State's sovereign immunity using its Article I powers, specifically, the Commerce Clause. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). This decision was overruled, however, by *Seminole Tribe*:

"[I]n overruling *Union Gas* today, we reconfirm that . . . [e]ven when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." 517 U.S. at 72.

The Supreme Court has repeatedly emphasized that this holding applies to all Article I powers, and that the only available power under which Congress can authorize a private suit for damages against a state is section 5 of the Fourteenth Amendment. *See Fla. Prepaid*, 527 U.S. at 636 ("*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers"); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80 (2000) ("[W]e adhere to our holding in *Seminole Tribe*: Congress' powers under Article I of the Constitution do not include the power to subject States to suit at the hands of private individuals. Section 5 of the Fourteenth Amendment, however, does grant Congress the authority to abrogate the States' sovereign immunity."); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003) ("For over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States. Congress may, however, abrogate such immunity in federal court if it . . . acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment." (citations omitted)); *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) ("[I]n order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment.").

The Supreme Court has recognized one exception to the bar against Article I providing abrogation of sovereign immunity, but that case did not involve private suits for damages, and it certainly did not authorize them in state court. *See Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 378 (2006) (holding that the Bankruptcy Clause of Article I granted federal bankruptcy court's jurisdiction over "proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts," even if those proceedings implicated state sovereign immunity). In fact, that limited exception in *Katz* only applied to orders ancillary to the bankruptcy courts' *in rem* jurisdiction. As the Court emphasized, "[b]ankruptcy jurisdiction, at its core, is *in rem*," *id.* at 362, in that "[t]he whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a *res*." *Id.* (*quoting Gardner v. New Jersey*, 329 U.S. 565, 574 (1947)). Thus, "in bankruptcy, the court's jurisdiction is premised on the debtor and his estate, and not on the creditors." *Id.* at 370 (internal quotation marks omitted). This distinction is critical since, unlike private suits for damages which present an unpredictable and open ended threat to the public treasury, *see Alden*, 527 U.S. at 750, the *in-rem* nature of bankruptcy proceedings ensures that States will only be involved when they were in possession of an identifiable piece of property over which the court already had jurisdiction.

Katz is further inapplicable because it concerned the jurisdiction of federal courts, rather than state courts. When considering the sovereignty of a state in the courts of another sovereign, the Supreme Court has found that, because the jurisdictional question "implicates the power and authority of a second sovereign; its source

must be found either in an agreement, express or implied, between the two sovereigns." *Alden*, 527 U.S. at 738. This nuanced analysis is "sharply distinguished" from suits against a state in its own courts, which implicate the far stronger sovereign immunity rule that "no sovereign may be sued in its own courts without its consent." *Id.* (quotation marks omitted). Thus, *Katz* does not provide a regular vehicle for Article I abrogation, and to hold otherwise would assume that *Katz* overruled *Alden sub silencio*—an assumption without warrant or support. *See* 546 U.S. at 375 ("[T]he Bankruptcy Clause of Article I, the source of Congress' authority to effect this intrusion upon state sovereignty, simply did not contravene the norms this Court has understood the Eleventh Amendment to exemplify.").

Critically, the Texas Supreme Court has reached the same conclusion. *Hoff*, 153 S.W.3d at 48. In *Hoff*, the court held that,

> Eleventh Amendment jurisprudence, although complex and actively debated, currently is settled in these two respects. First, federal courts have no jurisdiction over federal or state law claims against a state or state agency unless Eleventh Amendment immunity has been expressly waived by the state or abrogated by Congress pursuant to proper constitutional authority. Second, Eleventh Amendment immunity protects nonconsenting states from being sued in their own courts for federal law claims.

Id. (citations omitted). This analysis has been confirmed even after *Katz*. *Herrera*, 322 S.W.3d at 195 & n.11 (citing *Alden*, post-*Katz*, for the proposition that States are immune from private suit in their courts, absent waiver or Congressional abrogation pursuant to section 5 authority).

In short, binding precedent dictates that Congress has no authority to abrogate state sovereign immunity in Texas courts for private USERRA claims, and that *Katz*

did not change *Alden*'s core holding that Congress cannot subject a State to private suits for monetary damages.

2. Section 5 of the Fourteenth Amendment does not authorize Congress to abrogate the states' sovereign immunity from private USERRA claims for damages.

Torres did not allege, much less argue, that Congress passed USERRA pursuant to its enforcement power under section 5 of the Fourteenth Amendment, the only power the Supreme Court has ever held to permit abrogation of state sovereign immunity to damage suits. *See Garrett*, 531 U.S. at 374. This omission destroys his case. But even assuming, arguendo, that Torres had asserted that Congress enacted USERRA pursuant to its enforcement power under section 5 of the Fourteenth Amendment, he still cannot prevail because he cannot show that USERRA meets the two-pronged test of *City of Boerne v. Flores*, 521 U.S. 507 (1997).

As the Supreme Court of Texas has held, "Congress's § 5 enforcement power is not limitless." *Herrera*, 322 S.W.3d at 195. A federal regulation passed under Congress's Fourteenth Amendment section 5 power "must meet the two-part test refined in *City of Boerne v. Flores*—that is, it must (1) counter identified constitutional injuries by the States and (2) exhibit congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 195 (internal quotation marks omitted).

To meet *City of Boerne*'s first prong, "there must be a pattern of discrimination by the States which violates the Fourteenth Amendment" *Garrett*, 531 U.S. at 374. USERRA does not meet this prong because the statute was not enacted to vindicate

persons' fundamental rights; rather, it merely created non-fundamental, statutory rights. H.R. Rep. No. 105-448, at 2 (1998) ("[USERRA]'s purpose is to provide persons who serve for a limited period in the U.S. Armed Forces the right to return to civilian employment."). Nor does USERRA protect members of a suspect class. *See Velasquez v. Frapwell*, 160 F.3d 389, 391 (7th Cir. 1998), *opinion vacated in part on other grounds*, 165 F.3d 593 (7th Cir. 1999). Nor, for that matter, has Congress identified any pattern of statutory violations "by the States, let alone a pattern of constitutional violations." *Fla. Prepaid*, 527 U.S. at 640; *cf. Garrett*, 531 U.S. at 368 ("Once we have determined the metes and bounds of the constitutional right in question, we examine whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled."). To the contrary, Congress has found that States "regularly afford persons serving in the Armed Forces and Selected Reserve the rights guaranteed by these laws." H.R. Rep. No. 105–448, at 3; *see also id.* at 4 (recognizing the "relatively good record of compliance by state agencies with the law as it existed at that time"). Because there has been no proof of any constitutional violations (much less a pattern of them), and because the remedies authorized by USERRA would far exceed the comparable scope of any conceivable constitutional injury, the statute is not a product of valid section 5 legislation under the Fourteenth Amendment. Thus, the State's sovereign immunity bars Torres's claim.

3. The War Powers clause does not authorize Congress to abrogate the states' sovereign immunity.

Plaintiff argues that the State's immunity is abrogated because USERRA was enacted under Congress's War Powers, which are set forth in Article I, Section 8, Clause 11 of the United States Constitution. CR.54. In making the argument below, Torres relied on two irrelevant cases from courts in New Mexico and Wisconsin. Torres misrepresented the New Mexico Supreme Court's decision in *Ramirez v. State of New Mexico Children, Youth and Families Department*, 372 P.3d 497 (N.M. 2016), to the court below, saying that it had found that Congress had authority to abrogate state sovereign immunity under its War Powers. CR.55; RR.24.[4] In truth, the *Ramirez* court explicitly "decline[d] to decide whether, pursuant to the constitutional structure outlined at the Convention and ratified thereafter, the states implicitly consented to Congress's authority under its War Powers to override their sovereign immunity." 372 P.3d at 503. Instead, the court's decision rested on the independent ground that the state "[l]egislature consented to private USERRA actions for damages." *Id.* at 501. Thus, *Ramirez*'s rationale is inapplicable to Texas, which has not consented to private USERRA actions for damages. *See supra* at 6-9.

Likewise, *Scocos v. State Department of Veterans Affairs*, 819 N.W. 2d. 360 (Wis. Ct. App. 2012), is also irrelevant. There, the court found that a Wisconsin statute which waived sovereign immunity with respect to "all federal . . . laws affecting any

[4] It appears that the trial judge relied on these misrepresentations when issuing his order to deny the State's Plea to the Jurisdiction, since he did not have time to review any of the pleadings before issuing his judgment at the hearing. RR.19.

private employment" necessarily included USERRA, because USERRA was a federal law. *Id.* at 366–67. Taken together, *Ramirez* and *Scocos* merely underscore the unremarkable proposition that, if a state so chooses, it can waive its sovereign immunity with respect to various claims.

It is thus unsurprising that Torres's "war powers" argument has long been rejected in the Fifth Circuit. *Ysleta Del Sur Pueblo v. Laney*, 199 F.3d 281, 288 (5th Cir. 2000) ("'*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers . . . .' The Tribe's argument, therefore, that abrogation is justified by Congress' War Powers is misplaced." (citation omitted) (ellipses in original)). And even the courts that have addressed the question post-*Katz* have likewise found that Congress, using its war powers, cannot abrogate state sovereign immunity under USERRA. *Townsend*, 543 F.3d at 483 n.2 ("Congress did not use the terms 'must' or 'shall' with respect to state court jurisdiction over USERRA claims" because "the powers delegated to Congress under Article I of the United States Constitution [including the war powers] do not include the power to subject nonconsenting States to private suits for damages in state courts." (*quoting Alden*, 527 U.S. at 712)); *Risner v. Ohio Dep't of Rehab. & Corr.*, 577 F. Supp. 2d 953, 964 (N.D. Ohio 2008) (reasoning that because the war powers are conferred by Article I, they fall under the *Seminole Tribe* rule and thus "cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction" (citation omitted)); *Larkins*, 806 So. 2d at 362–63 ("*Alden* forecloses, on constitutional grounds, resort to Article I as the basis for subjecting the State of Alabama to suit in a state court on a remedy based upon Congress's assertion of its powers with respect

to military preparedness."); *Janowski*, 981 A.2d at 1170 (holding that "[USERRA] could not abrogate state sovereign immunity, because Congress passed that law pursuant to its Article I, Section 8 war powers"); *Anstadt*, 693 S.E.2d at 871 & n.14 (rejecting the argument that "the enactment of USERRA abrogated the state's sovereign immunity because it was enacted pursuant to Congress's war powers" as contrary to binding authority of *Alden* and *Seminole Tribe*); *Breaker v. Bemidji State Univ.*, 899 N.W.2d 515, 522 (Minn. Ct. App. 2017) ("We therefore analyze whether Congress had authority under the War Powers Clause to abrogate state sovereign immunity. United States Supreme Court precedent compels our conclusion that it did not."); *Clark v. Va. Dep't of State Police*, 793 S.E.2d 1, 6 n.6 (Va. 2016) ("[S]ince *Katz*, no court has affirmatively held that Congress's war powers may abrogate the sovereign immunity of States without their express consent."), *cert. denied*, 2017 WL 844009 (U.S. Dec. 4, 2017).

These decisions all comport with the Supreme Court's settled rule that "other courts" should not "conclude our more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). Rather, "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* (internal quotation marks omitted). *Alden* is directly on point here, holding "that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits

for damages in state courts." 527 U.S. at 712. And because courts are still bound by *Alden*'s holding, the State's immunity is intact.

Prayer

The Court should vacate the trial court's order denying DPS's jurisdictional plea, and dismiss the case for lack of subject-matter jurisdiction.

Respectfully submitted.

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Certificate of Service

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Certificate of Compliance

Microsoft Word reports that this brief contains 6269 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

/s/ John C. Sullivan
John C. Sullivan

No. 13-17-00659-CV

In the Court of Appeals for the Thirteenth Judicial District Corpus Christi, Texas

TEXAS DEPARTMENT OF PUBLIC SAFETY,

Appellant,

v.

LEROY TORRES,

Appellee.

On Appeal from the
County Court at Law Number One, Nueces County
No. 2017-CCV-61016-1

APPENDIX

Tab

Tab A: Order Denying Plea to the Jurisdiction

CAUSE NO. 2017CCV-61016-1

LEROY TORRES	§	**IN THE COUNTY COURT**
	§	
V.	§	**AT LAW NUMBER ONE**
	§	
TEXAS DEPARTMENT OF	§	
PUBLIC SAFETY	§	**NUECES COUNTY, TEXAS**

ORDER DENYING PLEA TO THE JURISDICTION

On this date November 14, 2017 came on for hearing Defendant's Plea to the Jurisdiction. After considering said Plea to the Jurisdiction, the Court is of the opinion that the it should be DENIED.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's Plea to the Jurisdiction is hereby DENIED.

SIGNED THIS 21 day of November, 2017.

JUDGE PRESIDING

TAB B: 38 U.S.C. § 4323

38 U.S.C. § 4323. Enforcement of rights with respect to a State or private employer

(a) Action for relief.—

(1) A person who receives from the Secretary a notification pursuant to section 4322(e) of this title of an unsuccessful effort to resolve a complaint relating to a State (as an employer) or a private employer may request that the Secretary refer the complaint to the Attorney General. Not later than 60 days after the Secretary receives such a request with respect to a complaint, the Secretary shall refer the complaint to the Attorney General. If the Attorney General is reasonably satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for relief under this chapter for such person. In the case of such an action against a State (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action.

(2) Not later than 60 days after the date the Attorney General receives a referral under paragraph (1), the Attorney General shall--

(A) make a decision whether to appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted; and

(B) notify such person in writing of such decision.

(3) A person may commence an action for relief with respect to a complaint against a State (as an employer) or a private employer if the person--

(A) has chosen not to apply to the Secretary for assistance under section 4322(a) of this title;

(B) has chosen not to request that the Secretary refer the complaint to the Attorney General under paragraph (1); or

(C) has been refused representation by the Attorney General with respect to the complaint under such paragraph.

(b) Jurisdiction.—

(1) In the case of an action against a State (as an employer) or a private employer commenced by the United States, the district courts of the United States shall have jurisdiction over the action.

(2) In the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State.

(3) In the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action.

(c) Venue.—

(1) In the case of an action by the United States against a State (as an employer), the action may proceed in the United States district court for any district in which the State exercises any authority or carries out any function.

(2) In the case of an action against a private employer, the action may proceed in the United States district court for any district in which the private employer of the person maintains a place of business.

(d) Remedies.—

(1) In any action under this section, the court may award relief as follows:

(A) The court may require the employer to comply with the provisions of this chapter.

(B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.

(C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.

(2)

(A) Any compensation awarded under subparagraph (B) or (C) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter.

(B) In the case of an action commenced in the name of the United States for which the relief includes compensation awarded under subparagraph (B) or (C) of paragraph (1), such compensation shall be held in a special deposit account and shall be paid, on order of the Attorney General, directly to the person. If the compensation is not paid to the person because of inability to do so within a period of 3 years, the compensation

shall be covered into the Treasury of the United States as miscellaneous receipts.

(3) A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.

(e) Equity powers.--The court shall use, in any case in which the court determines it is appropriate, its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter.

(f) Standing.--An action under this chapter may be initiated only by a person claiming rights or benefits under this chapter under subsection (a) or by the United States under subsection (a)(1).

(g) Respondent.--In any action under this chapter, only an employer or a potential employer, as the case may be, shall be a necessary party respondent.

(h) Fees, court costs.—

(1) No fees or court costs may be charged or taxed against any person claiming rights under this chapter.

(2) In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.

(i) Definition.--In this section, the term "private employer" includes a political subdivision of a State.